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SUPREME COURT U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

PETITION OF APPELLEE FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

STATUTES.

NAVY PERSONNEL ACT OF MARCH 3, 1899, §3, 30 Stat. L. 1007.

[OPENING CLAUSE]

"SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:"

[FIRST PROVISO]

"*Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:"

[SECOND PROVISO]

"*Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places:"

ARMY APPROPRIATION ACT OF MARCH 2, 1901, 31 Stat. L. 903.

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

PETITION FOR REHEARING.

Your petitioner, Charles M. Thomas, appellee in the above-entitled cause, prays for a rehearing and for reasons thereof assigns the following:

1. That "the Government made no appeal" (opinion, p. 6) from that portion of the judgment of the Court of Claims allowing the claimant mileage in the sum of $97.42, but this court has, notwithstanding, ordered this cause to be remanded with directions to dismiss the petition, whereas to be in conformity with the opinion, the judgment in favor of the claimant should stand for $97.42.

2. That this court held that the appellee was not entitled to the sum for which judgment was rendered by the Court of Claims in his favor, whereas the judgment of that court ought in law to have been affirmed.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

Brief in Support of Above Petition.

Claim of the Appellee.

The claim made by the appellee as captain in the United States Navy and sustained by the court below was based upon two statutes.

Section 13 of the act of March 3, 1899 (30 Stat. L. 1007), says that officers of the navy shall receive the same pay and allowances as officers of the army. The act of March 2, 1901 (31 Stat. L. 903), says that the pay of officers of the army shall be increased ten per cent when serving beyond the limits of the United States.

The claimant, an officer of the navy, served beyond the limits of the United States. He was denied ten per cent increase and claimed it in this suit. His claim is therefore absolutely within the terms of these statutes.

The appellee is uncertain whether this position was made perfectly clear to the court. It is not stated in terms in the opinion and some passages hereafter quoted indicate that it was not fully apprehended as the basis of the claim.

Objections Sustained by the Court.

The opinion takes two grounds of decision against the right of the appellee to extra pay:

1. Naval officers when beyond the limits of the United States are engaged in their normal duties. Consequently Congress could not be supposed to intend to pay them more than the usual rate of pay.

2. Some provisions of statute sustain the theory that this army increase is not intended for naval officers at sea.

Construction of Court of Claims.

The opinion of this court says (p. 4):

"Under this proviso an army officer ordered to the Philippine Islands receives an increase of pay from the

day he leaves San Francisco until he returns there. This allowance was undoubtedly based upon the consideration that service both in the Philippines themselves and upon the voyage going and returning, was an exceptional service, attended by peculiar hardships; but to say that navy officers shall be entitled to the same increase is practically to add ten per cent to their sea pay from the moment they leave a port of the United States until they return thereto; in other words, to increase their normal sea pay ten per cent whenever they are serving beyond the limits of the States.

"So far as applied to naval officers, it goes further than this. The act of 1901 does not, as did the act of 1900, limit the increase of pay to officers serving in our island possessions and in Alaska, but extends it to all serving 'beyond the limits of the United States,' so that if applied to naval officers, whenever a vessel is ordered to sea beyond the three-mile limit, be it only upon a practice cruise or a voyage from Pensacola to New York, every officer on such vessel is entitled to a ten per cent increase of his ordinary pay from the day he sets sail until the day he returns.

"It is not for a moment to be supposed that Congress contemplated any such sweeping innovation."

To ascertain the meaning of an act of Congress, it must first be read according to the natural meaning of its terms. If two meanings are consistent with its terms, one leading to a sensible, the other to an absurd, construction, the former must be adopted. No construction contrary to the plain meaning of the terms is to be admitted unless the natural construction is so absurd that Congress can not be supposed to have intended it.

The construction here declared "not for a moment to be supposed" is a construction not urged by the claimant here, declared incorrect by the Court of Claims in this case and overruled in principle by this court in a closely similar case.

If an army transport were sent from Pensacola to New

York, we can not believe that an army officer on it would receive increased pay under the act of 1901. That act, read as a whole, contemplates service elsewhere than in the United States, not a voyage between purely domestic points.

The claimant in his petition stated a claim for this increase while on the way from San Francisco to Puget Sound, but it was only urged provisionally by way of emphasizing another claim (see opinion of Court of Claims, rec. 11, and statement of case in opinion of this court, p. 1). The claim was rejected by the Court of Claims (rec. 24):

"This [increased pay], however, does not include the services rendered by the claimant in cruising along the Pacific coast between San Francisco and Bremerton."

The claimant admitted the correctness of this ruling by not appealing from it, although no evidence is needed that much of this voyage was over three miles off coast.

Thus the very "sweeping innovation" which is treated in the opinion of this court as a reason for denying the appellee's claim, has already been held to be outside the meaning of this statute.

This is exactly in accord with the decision of this court, written by the same learned Justice who writes the opinion in the present case, in *United States* v. *Hutchins* (151 U. S. 542). A naval officer traveling from San Francisco to New York by the Isthmus of Panama was allowed mileage because "traveling under orders in the United States" and not "traveling abroad." The first term is an almost exact antithesis to the term in the act of March 2, 1901,—"serving beyond the limits of the States."

The construction by Attorney-General Cushing cited in our brief, pp. 42, 43, of the like words "on the coast" supports the same view.

The Several Rates of Pay.

Adopting on the authority of that case the ruling of the Court of Claims on this point, the following results as the theory of the meaning of these statutes sustained by the court below :

(*a*) Officers on sea duty in bays, rivers and harbors of the United States or voyaging between domestic points receive ordinary army pay (enacting clause of § 13).

(*b*) Officers sent to foreign stations for either sea or land service receive ten per cent increase on this pay (enacting clause and 2d proviso of § 13 and act of March 2, 1901).

(*c*) Officers on shore duty in the United States receive fifteen per cent less than army pay (1st proviso of § 13).

The first class would include all officers on the North Atlantic and Pacific Squadrons while off the coasts of the United States and all officers on receiving and training ships. The second class would include those sent to the Asiatic, South American and European stations or other foreign points.

Surely this is no such absurd classification of naval officers for pay as to lead to denying to these acts an interpretation according to the natural meaning of their words. It is the same classification for the navy as provided by the statute for the army.

Result of Construction of Court Below.

This construction gives this increase of pay for the cause expressed in the statute, namely, that the officers go beyond the States.

This construction assimilates army and navy pay by giving to each branch ordinary pay for service at home and ten per cent increase for service abroad.

This construction rests on the best of reasons for in-

creased pay—increased expenses on foreign stations. That reason applies equally to army and navy officers.

The suggestion upon which this increase was granted was made in the report of the Adjutant-General for 1899, to the Congress which passed the two increase acts of 1900 and 1901. It is found in the Report of War Department, 1899, Vol. 1, Part 2, p. 32, under the head of "Pay and Rank of Officers":

"The pay of all officers below the grade of Brigadier-General should be increased at least 33⅓ per cent while on duty in Cuba or our new possessions. Most of the gentlemen have families that they are unable to have with them, and are therefore compelled to maintain two establishments—a difficult undertaking when the amount of their pay is considered. The increase would meet in a measure their actual living expenses. This legislation is urgently recommended."

This mentions only expenses, not hardships or tropical dangers, as the ground of the increase and gives a cause of expense applicable alike to foreign service of naval officers at sea and army officers on land.

This construction does not involve the idea, absent from the terms of the statute, of increased pay for "hardships." It has not been necessary or usual to increase the pay of our army or navy for hardships. Nor are hardships necessary incidents to service outside the United States. Diplomatic assignments in Europe, special duty on foreign inspection, duty in Hawaii or Porto Rico, in then peaceful Cuba and on a Pacific Ocean voyage involve no "hardships," although the army receives the increase for all these. But all foreign service involves both the army and the naval officer in the increased expense of maintaining himself away from home and his family at home.

This construction does not involve a "sweeping innovation" in the navy as compared to the army. In 1901

(see appellee's brief, pp. 28–32), two-thirds of the army officers, but only a little over a third of the naval officers would receive the increase upon this construction.

This construction, thus classifying naval officers for pay, is not necessarily wrong because the classification is new.

The army before 1899 received higher pay than the navy and succeeded in getting increased pay for foreign duty soon after such duty became general. Some increase for the army might have been anticipated from its past superiority in pay; and so § 13 of the act of 1899 not only corrected the past inequality in army and navy pay, but was made "prospective in its application to future legislation" (opinion, p. 2).

The navy for many years had been doing foreign service, without higher pay for this distant, always expensive, and sometimes disagreeable, duty. That the navy had not before the date of the Personnel Act received a higher rate of pay which was so early after its passage granted to the army is not a reason why the navy is not justly entitled to it. It is a reason for believing that the only way in which equal pay to the army and navy could be assured was by a statute requiring future assimilation. This is done by the construction of the Court of Claims, which gives the increase to all alike when on foreign service.

The construction adopted by this court contravenes a long-established principle in naval pay, by making shore pay higher than sea pay in the same vicinity. In *Rodgers* v. *United States* (185 U. S. 83, 92), the court held that another section of the Personnel Act (§ 7) must be construed in the light of "the general rule in respect to naval service of a difference between the pay of officers doing shore duty and of those at sea." Certainly no contrary presumption of an intent to give higher pay for shore than for sea duty is

warranted, in the absence of an express declaration by Congress to that effect. Yet, according to the decision just rendered, an officer of the navy on shore duty at the Cavite naval station will receive ten per cent more pay than his fellow officer of the same rank on sea duty in the adjacent waters of the harbor.

The construction of the court below recognizes that the "normal" duty of both army and naval officer is to go where his country's need sends him. When the act of 1899 was passed, both army and naval officers were engaged in both foreign and domestic service. The same pay was received for both kinds of service and both were normal to both classes of officers. The statute draws no line of pay between normal and abnormal duties; the line is between duties at home and abroad. If duty abroad deserves higher pay, it is due as much to the naval as to the army officer.

Naval officers' "normal duties" (opinion, p. 4) are as much ashore as at sea. The Navy Register of January, 1904, shows that the total sea service of each of twenty out of twenty-seven rear-admirals during his entire career has been less than his total shore service and that the sea service of every one of the twenty-seven is less than his shore service and his time unemployed. Naval officers by express enactment have fifteen per cent less than army officers on domestic shore service. Are they to have a second dissimilation, based on inference alone, when on foreign service?

No Contrary Statutes.

Two statutory provisions are referred to in the opinion of the court as supporting the free construction now sustained and forbidding the literal construction now overruled.

Second Proviso of Section 13.

The opinion says (pp. 3, 4, 5):

"Confirmation of this view is found in the second proviso of section 13, 'that when naval officers are *detailed for shore duty beyond seas* they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the army detailed for duty in similar places.' Here is a distinct recognition of the fact that when naval officers are detailed for a special or unusual duty beyond seas, they shall receive the same pay as army officers detailed for the same duties. This provision, however, would be wholly unnecessary if the act were given the broad application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect. * * *

"This construction would not only render nugatory and obsolete the proviso of the Personnel Act that officers to be entitled to army pay shall be detailed for shore duty. * * *

"In our opinion the proviso that naval officers shall be entitled to army pay 'when detailed for shore duty beyond seas,' is not repealed or rendered inoperative by anything contained in the acts of May 26, 1900, and March 2, 1901."

It is, with deference, suggested that the court overlooked (as did the Court of Claims on the first hearing) the opening clause of the Personnel Act, § 13, on which alone the claimant relies. That opening clause gives to naval officers "the same pay and allowances * * * as * * * provided * * * for the officers * * * in the army." Its first proviso says that when on shore they shall have "fifteen per centum less pay than when on sea duty." Its second proviso says that when "detailed for shore duty beyond seas, they shall receive the same pay and allowances as * * * officers of the army detailed for duty in similar places." The opening clause is the only provision governing pay while on sea duty.

The opening clause fixes their sea pay at army pay. The first proviso fixes their domestic shore pay at army pay, less fifteen per cent. The second proviso fixes their foreign shore pay at army pay. There was at that date no increase for foreign service in army or navy.

The opening clause and the second proviso make the same grant. The latter is expressed in greater detail. Both give to naval officers army pay. The first proviso reduces their army pay, when on shore. The second proviso restores the full army pay, if that shore duty is rendered beyond seas. Its object was not to give to naval officers on shore duty beyond seas any more pay than received at sea. It was to put them, if the shore duty is beyond seas, where they would have been without the first proviso.

The increase to army officers for foreign service was not granted at this time or even under consideration. Is it possible that the language quoted implies the supposition that at the date of the Personnel Act army officers abroad received some increased pay? The proviso must be construed in the light of the then existing law and not as if the later act had then been in force. Its only meaning is that officers on shore duty beyond seas shall not suffer the shore duty reduction, but shall recive army pay, as provided by the opening clause for officers not on shore.

Necessity for Second Proviso.

The first of these passages quoted contains at its close what appears to be a misapprehension as to this second proviso, probably affecting the general conclusion. The same idea is in the other passages. It says (p. 3):

"This provision [the second proviso], however, would be wholly unnecessary, if the act were given the broad

application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect."

This proviso is necessary under any construction, because without it, officers on shore duty beyond seas must have suffered the fifteen per cent reduction required by the first proviso for duty "on shore." Indeed, naval officers on duty in the Philippines were actually paid at the reduced rate, under the decision of the Comptroller that the Philippines were not "beyond seas," until the Court of Claims enforced the full rate (*Irwin* v. *United States*, 38 C. Cls. 87).

The Appropriations.

The opinion refers (p. 5) to later army and naval appropriation acts, as showing that the army acts appropriated for this increase while the naval acts did not. This omission is cited as showing what "Congress supposed" to be the law. The argument is itself advanced only as "lending support" to the preceding arguments.

The naval appropriation acts, we pointed out in our reply brief (pp. 3, 4), do not segregate items as do the army acts, but make a lump appropriation for all pay and allowances of officers and men of the navy. See 31 Stat. L. 684, 1107; 32 Stat. L. 662, 1177. No item for ten per cent increase would appear in the naval act. The argument, indeed, proves too much; for there is no appropriation for that ten per cent increase which the opinion declares to be due, namely, for shore duty beyond seas.

The lump sum appropriated by the naval appropriation act of June 7, 1900, for pay of officers and men of the navy (31 Stat. L. 684), was $12,810,897; by the act of March 3, 1901 (31 Stat. L. 1108), $15,200,284. It can not be said that an increase in pay estimated to amount

to within $125,000 a year (not exceeding 500 officers at $250 a year, see our brief, p. 31), is not included in this great increase of $2,389,387.

Another sufficient reason exists why no appropriation for this purpose should have been made. Appropriations are made by Congress in pursuance of departmental estimates. Estimates are based on the departmental construction of the statutes. The Comptroller of the Treasury having decided that this ten per cent increase was not applicable to naval officers, the departments would not estimate for the increased pay and Congress would not appropriate for it until the substantive right was finally determined by the courts. Then an estimate would be made, and an appropriation would follow. The omission to appropriate follows from the adverse decision of the Comptroller and the consequent failure to estimate for it. The substantive right is not affected by such decision or by the absence of an appropriation.

Colonel's and Captain's Pay.

Other passages of the opinion suggest that in the great complication of these statutes, counsel have failed to make all points of detail entirely clear to the court, and emphasize the propriety of a re-argument.

The opinion says (p. 2):

"It was, however, a source of dissatisfaction to navy officers that some of them did not receive the same pay as corresponding officers of the army, although others received a larger pay. Thus by sections 1261 and 1556 the highest pay of a rear-admiral, when at sea, was $6,000, while a major-general received $7,500, a commodore received $5,000 when at sea, while a brigadier-general received $5,500. A captain, however, when at sea received $4,500, while a colonel received but $3,500."

The pay of a colonel, $3,500 there stated, is the grade

pay of a colonel (Revised Statutes, § 1261). But every colonel in the army and every captain in the navy, including the claimant, is of over fifteen years' service and is entitled under Revised Statutes, §§ 1262 and 1267, to $4,500 a year, exactly the pay of a naval captain under Revised Statutes, § 1556. This grade is cited in the opinion as an instance of army pay being less than navy pay. Perhaps it was supposed that the appellee was receiving $4,500 as the pay of a captain under the old navy pay table and consequently could not claim ten per cent increase upon that pay.

The brief for the United States (top of page 8) was misleading in this particular, although its statements were corrected in our reply brief (pp. 1, 2).

In fact in the line of the navy old navy pay exceeds army pay in substantially but two cases:

	Navy pay.	*Army pay*
Lieutenant, junior grade, if less than 10 years in service	$1,800	$1,650
Lieutenant, if less than 20 years in service	$2,400	$2,340

If either had more service, the navy pay would not be higher and consequently he would draw army pay.

Addition of Fifteen Per Centum.

The opinion says (p. 5):

"This omission lends support to the theory that Congress supposed that the ordinary sea services of naval officers were sufficiently compensated by the addition of fifteen per centum to their shore pay."

Under the Personnel Act fifteen per cent is not added to shore pay to make sea pay. Sea pay is ascertained by finding the pay of an army officer. From that pay fifteen per cent is deducted to find shore pay. Is it possible that it was in the mind of the court that naval officers receive army pay on shore and fifteen per cent additional when at sea?

No Limitation on Powers of Congress.

The opinion says (p. 3):

"It never could have been the intention of Congress to disable itself from awarding to a particular class of army officers an increase of pay for exceptional services without thereby increasing the pay of navy officers, whose lives are largely passed in performing like services."

The appellee contends that the act of 1899 explicitly declares that when Congress awards to army officers an increase of pay, the grant inures to naval officers by the assimilating clause of the Navy Personnel Act. But Congress is not disabled from providing otherwise by expressly excluding them. Here the intent of Congress expressed in the act of 1899 controls, because it is not otherwise provided in the act of 1901.

"General Pay" in the Army.

At the bottom of page 2 and top of page 3, reference is made to the "general pay of army officers" as fixed by Revised Statutes, § 1261. No army officer receives as his total pay the "general pay" provided by this section, except a second lieutenant, and he usually for only a brief period, since all enlisted, cadet and commissioned service counts for longevity under § 1262, Revised Statutes.

Pay of army officers as now received consists of grade pay, § 1261, longevity pay, § 1262, and foreign service pay, act of March 2, 1901, and certain special rates for particular duty, such as aid's pay (*Crosley* v. *United States*, 38 C. Cls. 82; Revised Statutes, § 1261), or higher command pay, act of April 26, 1898, § 7, 30 Stat. L. 365 (10 Comp. Dec. 123). If naval officers are to be on an equality with army officers they must be entitled to these increases whether for longevity or for foreign service or for like

special duty as well as the "general pay" (grade pay) under Revised Statutes, § 1261.

Is there not some inconsistency between the objection that this increase is not "general pay" (although when passed two-thirds of the army received it, appellee's brief, p. 29), and the term "sweeping innovation" (opinion, p. 4) when applied to the navy where a smaller proportion would receive it (appellee's brief, pp. 30, 31)?

Uniformity in Interpretation.

Many of the interested persons are the same in this case as in *Dewey* v. *United States*, 178 U. S. 510, and *Gibson* v. *United States*, 194 U. S. 182. In the *Dewey* case, this court adhered in a very forcible statement of its views to a literal interpretation of the naval bounty act, although it was clear that a liberal construction would have supported the general spirit and purpose of the act. In the *Gibson* case, this court refused the old naval sea ration to naval officers because the terms of the act literally enforced forbade its continuance, although the ration still remained equally appropriate to naval sea duty. Here the appellee is literally within the words of the acts; but his claim is rejected on the very broad doctrine of construction that "it is not for a moment to be supposed that Congress contemplated any such sweeping innovation." Are not these officers right in thinking that equal justice requires the will of Congress to be ascertained here as in the other cases from "the words Congress has chosen to employ" (178 U. S. 520)?

Change of Opinion Below.

When the Court of Claims first heard this case, it was decided adversely, even after unlimited oral argument. Upon more elaborate study of the acts, themselves of

great intricacy, and upon further argument and reflection, the Court of Claims admitted its misapprehension of the grounds of the claim and decided that its first decision was erroneous. This indicates the complexity of the subject-matter, even to a court whose duties are largely to decide statutory questions relating to pay of United States officers. This fact emphasizes the value of re-argument and review in this very case.

Conclusion.

The question affects a considerable number of a class deserving well of their country. It is respectfully submitted that we have pointed out potent reasons for fearing that in the present condition of the record their rights are concluded without a complete apprehension of the merits of their claim.

GEORGE A. KING,
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Attorneys for Appellee.

Certificate.

The undersigned counsel for appellee hereby certify that in their opinion the grounds stated in the foregoing petition and in the accompanying brief are valid grounds in law for a rehearing of this case.

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